UNITED STATES OF AMERICA

ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	:	
Alyeska Pipeline Service Company, NPDES Permit No. AK-002324-B	:	Docket No. 1091-01-01-402
Permittee.	:	

JUDGE'S RULING ON MOTIONS FOR

SUMMARY DISPOSITION

401 M Street, S.W.
Room 2107
Washington, D.C.

Wednesday, November 17, 1993

The above-entitled matter convened, pursuant to notice, at 2:00 p.m.

BEFORE:

HONORABLE JON G. LOTIS, Administrative Law Judge

APPEARANCES:

On Behalf of the Complainant:

BONNIE L. THIE, ESQ.
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region X
1200 Sixth Avenue
Seattle, WA 98101

On Behalf of the Permittee:

JOHN W. PHILLIPS, ESQ.
Heller, Ehrman, White & McAuliffe
6100 Columbia Center
701 Fifth Avenue
Seattle, WA 98104-7098
-and-
JORDAN JACOBSON, ESQ.
Alyeska Pipeline Service Company

On Behalf of Intervenor-Petitioners:

ROBERT B. BRIGGS, ESQ.
P.O. Box 20629
Juneau, AK 99802

P R O C E E D I N G

JUDGE LOTIS: Let's go on the record. Will the parties please identify themselves? Although they won't be speaking here, since I'll just be giving my ruling, I would like to have their names on the record just to show who was on this call. First for EPA?

MS. THIE: This is Bonnie Thie. I'm with Region X, and with me are Charles Wright and Ann Daly.

JUDGE LOTIS: All right. For Alyeska?

MR. PHILLIPS: This is John Phillips with Heller, Ehrman, White & McAuliffe for Alyeska, and with me is Jordon Jacobson at Alyeska Pipeline Service Company.

JUDGE LOTIS: All right. For Greenpeace, et al.?

MR. BRIGGS: This is Robert Briggs, appearing for the intervenor appellants.

JUDGE LOTIS: Thank you very much. I'd like to proceed now with my ruling. At times I will be referring to documents, so I ask the parties patience while I retrieve them and refer to them.

At issue in this case is one provision of a 36-page National Pollutant Discharge Permit issued to Alyeska Pipeline Service Company for its ballast water treatment

facility in Valdez, Alaska. That provision is Part I.B.3. Before me are motions to intervene and for a summary disposition filed by Greenpeace USA to Prince William Signers Association and Cordova District Fishermen United. In the future, I will refer to them collectively as Greenpeace in this ruling. Motions for summary disposition have also been filed by EPA and Alyeska.

At the outset, I should note that because of the unusual procedural circumstances of this case with the stay of this proceeding following the retirement of Judge Yost, I have decided to accept Greenpeace's June 15, 1993 motion for summary disposition which was filed out of time. I advised counsel for Greenpeace that deadlines fixed by this court, as they were in this case when I approved the parties proposed scheduling, are to be strictly observed. And that absent unusual circumstances and especially unusual circumstances that were presented here as a result of the stay, its June 15th pleading would have been rejected.

Greenpeace, moving on to the issue at hand, Greenpeace requests that the 1990 permit modification to Part I.B.3 be rejected and that the 1989 permit langauge of Part I.B.3 be restored. EPA and Alyeska motions for summary

disposition request the approval of the 1990 permit modification to Part I.B.3.

For reasons I will now discuss, Greenpeace's request to intervene is granted. Greenpeace's motion for summary disposition, however, is denied, and the motions of EPA and Alyeska for summary disposition are granted.

First, I'd like to give some background to lend some context to this ruling. The permit was first issued to Alyeska in 1974 and was reissued to Alyeska in 1989. Alyeska's appeal of the reissued permit led to the 1990 modification of approximately 26 parts of the 36-page permit. Included among the changes was a modification to Part I.B.3.

On December 19, 1990, a Mr. Charles Hamel initiated this proceeding with a request for an evidentiary hearing regarding Part I.B.3 of the permit. An EPA Region X granted Mr. Hamel's request on January 14, 1991, and in so doing it stated that the issues set for hearing is whether the Part I.B.3 requirement is adequate to prevent the unauthorized entry of toxic substances into the Alyeska water treatment facility and the discharges therefrom.

Mr. Hamel's specific concerns appear to have been

met when Alyeska made changes to its best management practices' plan which changes were approved by the EPA. Mr. Hamel consequently withdrew his appeal on July 18, 1991.

On February 6, 1991, Greenpeace moved to intervene. Judge Yost denied the request. Upon appeal of Judge Yost's decision, Chief Judicial Officer McCallum remanded for consideration the question of whether grounds for intervention exist. But he affirmed Judge Yost in his decision to deny Greenpeace the opportunity to raise new issues.

In his February 6, 1991 request to be admitted as a party, Greenpeace states on page 4 that "In addition to the challenge by Charles Hamel, with which requestors seek to join." The sentence goes on to inject other issues not raised by Mr. Hamel. But from the quoted excerpt I've just read, it's clear that Greenpeace seeks to pursue the same issue; that is, the Part I.B.3 modification that Mr. Hamel had raised.

I note also that Alyeska's February 26, 1991 response to Greenpeace's request to raise additional issues does not assert that Greenpeace should be denied party status with respect to the issue raised by Mr. Hamel.

Rather, it's objection goes to Greenpeace's request to raise additional issues and to Greenpeace's request for a hearing on matters which Alyeska considers is not properly before this forum.

Because Mr. Hamel's challenge to the modification of Part I.B.3 was obviously sufficient to meet the requirements of the EPA rules to initiate this case and to permit his participation as a party, so too must a petition of another party who seeks to join in that same challenge. Accordingly, Greenpeace's request to be admitted as a party is granted. However, the issue it may address is limited to the 1990 modification of Part I.B.3 of the Alyeska permit.

As recognized by Chief Judicial Officer McCallum, the other issues raised by Greenpeace are not appropriate for an evidentiary hearing because they either: (1) involve permit conditions approved pursuant to State certification; (2) involve permit conditions that are not subject to the modification procedure; or (3) are purely legal in nature.

I turn now to an examination of Part I.B.3 of the permit and ask the reporter to copy into the record at this point, as though read, this one-page summary. I shouldn't say summary, it's a one-page document which appears as

Appendix One to EPA's Memorandum in Support of its August 25, 1993 Motion for Summary Determination. That page shows a side-by-side comparison of the Part I.B.3 language as it appears in the 1989 and 1990 permits.

[The Appendix One to EPA's Memorandum in Support of Summary Determination Motion follows:]

JUDGE LOTIS: Now Greenpeace would prefer to return to the original language of Part I.B.3. It argues that the original language before the modification requires Alyeska to randomly, routinely and frequently sample ballast water to prevent unauthorized materials from being discharged into its ballast water treatment facility and from there into the port of Valdez.

Greenpeace used the 1990 modification as relieving Alyeska of this alleged obligation. EPA and Alyeska see it differently. They view the 1990 modification as merely clarifying what was intended by the 1989 language--no more, no less. My review of the pleadings and the documents submitted with those pleadings confirm the view and position of the EPA and Alyeska.

First let me read the langauge of Part I.B.3 before modification that presumably carries with it the obligation which Greenpeace alleges:

"The permittee shall determine whether incoming ballast water is contaminated with pollutants other than crude oil. For each tanker the permittee Shall (1) examine the oil record book, and (2) obtain a completed copy of Alyeska's "Ballast Water Survey Form," containing specific

information on the amount and constituents of the ballast and bilge water to be offloaded."

Now the second sentence I have just quoted lists two specific requirements which Alyeska must meet for each tanker that docks and releases ballast water. Greenpeace maintains that these are only examples Alyeska's universal duty to verify non-crude oil contaminants and that such responsibility remains even when the oil record book and the ballast water survey form indicate that no pollutants exist.

Under Greenpeace's reading, an obligation is imposed on Alyeska to identify non-crude oil pollutants at whatever cost and by whatever means. On the other hand, EPA and Alyeska maintain that the second sentence defines the limited extent of Alyeska's responsibilities and that the first sentence describes the general purpose behind those requirements.

Alyeska and the EPA are correct for a number of reasons. First, if the intent were to create an absolute requirement that Alyeska verify all non-crude oil contaminants by whatever means possible, then one would have expected the second sentence to be followed by a statement that the check of the oil record book and the completed

ballast water survey form were but two examples of the means by which Alyeska were to fulfill its obligation, and that they were not intended to limit Alyeska's obligation. Alternatively, the EPA could have omitted the second sentence entirely, thereby, eliminating the prescription of the manner in which these responsibilities were to be carried out.

Second, it's clear that in adopting the language found in the 1989 permit, the EPA required that the oil record book and the ballast water survey form were to be the means by which Alyeska was to determine whether the ballast water contained contaminants other than crude oil.

I'd like to quote now from the EPA's Region X response to public comments made in connection with the 1989 permit issued to Alyeska. I will be quoting from page 49 of EPA's Exhibit BB attached to its August 27, 1993 motion.

"The final permit (Part I.B.3) requires that Alyeska determine whether "incoming ballast water is contaminated with pollutants other than crude oil" (see response to comment one). If the ballast water contains substances other than crude oil, these shall be identified and quantified and reported on the next monthly DMR. To

make this determination, the final permit requires that Alyeska have each vessel capped and complete Alyeska's "Ballast Water Survey Form" (rather than verbally ask the ship's captain). Alyeska is also required to examine the oil record book of ships delivering incoming ballast and bilge water and keep copies of pertinent pages from the logs. (The draft permit simply required inspection of the "ships logs" which could be interpreted to include logs unrelated to the oil record book). This information can be used to assess the contents of the ballast (and bilge) waters. According to Alyeska's comments both of these requirements are procedures which the terminal personnel are already required to follow."

Third, when modifying the permit in 1990, the EPA made clear that the original intent of the Part I.B.3 of the 1989 permit was not changed by virtue of the modification. And I'd like to quote again from this time page 11 and 12 of EPA's Exhibit CC attached to its August 27, 1993 motion.

"Chuck Hamel commented that EPA should not change Part I.B.3 so as to relieve the TAPS owner companies and Alyeska of their responsibility to identify and prevent waste/contaminants from being disposed of through the BWT

Facility. He recommended that EPA require "the tanker owner/operators and their charters to periodically provide certification that, to the best of their knowledge, no extraneous waste/contaminants were injected into or added to the ballast water or pumped to shore at Alyeska from any separate tanks such as slop tanks."

Then quoting EPA's response: "Although EPA agrees with the commentator in part, the intent of this section has not changed. The proposed to Part I.B.3 serve to clarify Alyeska's responsibilities. Alyeska is still responsible for identifying and preventing contaminants from being disposed of in the treatment facility. Alyeska is required to review the oil record book and Ballast Water Survey Form for substances other than crude oil, and then to identify and quantify any contaminants."

I'd like to rely on also the following two paragraphs on that page 11 of that exhibit, as well as the top paragraph on page 12 which states that: "The suggested certification by the on site representatives of the tanker owner/operators is already being done. The tanker captains are required to complete the Ballast Water Survey Form which in essence is a certification that the discharge ballast

water does not contain other contaminants."

Fourth, EPA and Alyeska's reading of Alyeska's obligation under the 1989 permit is consistent with the second paragraph of Part I.B.3 which remain unchanged in the 1990 permit. The second paragraph deals with bilge water and makes clear that the means by which Alyeska determines whether bilge water contains prohibited waste is from the Ballast Water Survey and oil record book. I'd like to quote from that second paragraph.

"The permittee shall similarly determine from the Ballast Water Survey Form and oil record book whether bilge waters contain waste other than those which can be expected to collect in a tanker's machinery spaces."

The words "similarly determine" is an obvious cross reference to the preceding paragraph concerning ballast water. It indicates that they were to be handled in the same manner. Based on my review and the language in question and the contemporaneous comments that accompany the issuance of the permits, it appears clear that the modification represents no substantive change in the permit. Moreover, based on its comments, EPA's enforcement of the permit would be identical under either version of the

permit.

For all of these reasons, Greenpeace's argument that the modification reduces Alyeska's obligation under the permit is rejected. Greenpeace also contends that there is no regulatory provision which would permit or allow this modification.

As I've indicated, the modification does not constitute a substantive change in the permit. Rather it represents either a minor modification as contemplated by 40 CFR Section 122.63(a) or a technical correction of the type permitted by 40 CFR Section 122.62(a)15. But for the fact that there were other modifications to the 1989 permit, the Part I.B.3 modification may not have been subject to the public permit modification procedures. 40 CFR Section 122.63(a) allows the Agency to make minor modifications to permits; to correct, among other things, typographical errors; and to require more frequent monitoring or reporting by the parties.

Now the modified language in the 1990 permit requires Alyeska to perform testing of samples of ballast waters as the State and Alyeska may request. Alyeska was not required to perform such sampling under the 1989 permit.

Mr. Hamel, with Greenpeace standing in his shoes, did not contest this potentially increased reporting requirement. The language changed in Section I.B.3 to clarify intent, while not strictly falling within the category of a typographical error, certainly falls within the category of changes that administrative agencies are permitted to make without notice and opportunity for public comment. I'll refer to the cases cited by Alyeska in its motion to dismiss. More specifically, Howard Sober, Inc. v. ICC, 628 Fed. 2D, 36 of page 31; a D.C. Circuit Decision of 1980; Chlorine Institute v. Ashra, 613 Fed. 2D, 120 at page 122, Fifth Circuit 1980 Decision; and Chicano Education and Manpower Services v. Department of Labor, 909 Fed. 2D, 1320 at page 1328, a Ninth Circuit 1990 Decision.

Now if the modification is not construed as a minor modification, the modification fits the mold of a technical correction of a type permitted by 40 CFR Section 122.62(a) 15. Therefore, by virtue of EPA regulation and basic corn book law, the EPA has the authority to clarify the intent of the condition to a permit when no substantive change is involved without opening the permit to substantive changes and without undertaking evidentiary hearings to

defend its clarification. To require the EPA to defend a non-substantive modification to a permit condition, is to permit a reopening of the underlying permit condition in violation of 40 CFR Section 122.5(c)(2).

That section limits appeals of permit modifications to only those aspects of the permit which have been modified, and I'd like to quote from that section. "In a permit modification under this section, only those conditions to be modified shall be reopened when a draft permit is prepared. All other aspects of the existing permit shall remain in effect for the duration of the unmodified permit."

Finally, I turn now to the question posed by the Regional Administrator in his January 14, 1991 decision which *grant Mr. Hamel's request for an evidentiary hearing. More specifically, whether the Part I.B.3 modification is adequate to prevent the unauthorized entry of toxic substances into the Alyeska water treatment facility. That question is reached only if the modification is found to represent a substantive change in the condition. As I have held the modification causes no substantive change in Alyeska's obligation in determining whether non-oil

contaminants enter its facility. Alyeska's obligation to determine whether incoming ballast water is contaminated with non-oil pollutants by use of the oil record book and the Ballast Water Survey Form was established for the first time in Alyeska's 1989 permit and not in the 1990 permit modification. As a matter of law, the 1989 permit cannot be reopened to alter Alyeska's obligation under that permit, and the 1990 permit modification did not change that obligation.

In conclusion, since the changes challenged here are not substantive and EPA's enforcement of the permit would be the same under either version of the permit, Greenpeace's hearing or request is dismissed because it does not raise a genuine issue of material fact relevant to the modification of Part I.B.3. EPA and Alyeska's motions for summary determination are granted and this proceeding is terminated.

I'd like to mention one final matter, a procedural note. I believe a fair reading of the Agency's rules would suggest that the time for an appeal from this ruling should start running from the time the transcript becomes available through the Regional Hearing Clerk. And I stress it's not

when the parties choose to pick up that transcript, but upon the time that they are notified of its availability, which I understand their Regional Hearing Clerk issues a notice to that effect to all parties.

My understanding also to assist the parties somewhat is the reporter here today suggests to me that the availability of the transcript to the Regional Hearing Clerk would probably be either around November 22 or 24 or thereabouts in that area. So that would give you some idea of when to be on the lookout for the transcript.

There being no other matters to consider today, this session is adjourned. Thank you all very much.

[Whereupon, at 2:37 p.m., the telephone ruling adjourned.]

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

UNITED STATES OF AMERICA

ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF :

:

Alyeska Pipeline Service Company, : Docket No.

NPDES Permit No. AK-002324-B : 1091-01-01-402

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Permittee :

JUDGE'S RULING ON MOTIONS FOR

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Pages 1 thru 19 Washington, D.C.

November 17, 1993

MILLER REPORTING COMPANY, INC.

507 C Street, N.E.

Washington, D.C. 20002

(202) 546-6666